No. 14817

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT RIDDELL, COLLECTOR OF INTERNAL REVENUE, AND HARRY C. WESTOVER, FORMER COLLECTOR OF INTERNAL REVENUE,

Appellants,

vs.

EARL CALLAN AND HELEN W. CALLAN,

Appellees.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANTS.

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Opinion Below.

The memorandum of the District Court in the companion case of *Earl Callan v. Westover* denying defendants' motion to dismiss [R. 55-73], also applicable to this case, is reported at 116 F. Supp. 191.

Jurisdiction.

This appeal involves income taxes for the years 1946 and 1948. The taxes in dispute were paid on February 5, 1951. [R. 12, 115.] Claims for refund were filed on August 14, 1951. [R. 17, 35, 77, 82.] More than six

months elapsed from the date of filing of the claims without the Commissioner rendering a decision thereon, nor disallowing the claims. [R. 18, 36, 77, 83.] Within the time provided in Section 3772 of the Internal Revenue Code of 1939, and on March 10, 1952, the taxpayers brought an action in the District Court for recovery of the taxes paid. [R. 3-38.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. The judgment was entered on February 16, 1955. [R. 112-115.] Within sixty days and on April 15, 1955, a notice of appeal was filed. [R. 121-122.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether a loss caused by the destruction of taxpayer's property by flood in 1938 was sustained in that year or was sustained in 1948 when taxpayer's claim against the Los Angeles County Flood Control District was settled.

Statutes and Regulations Involved.

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * * * *

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

Art. 23(e)-1. *Losses by individuals.*—

* * * * * * * *

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. Full consideration must be given to any salvage value and to any insurance or other compensation received in determining the amount of losses actually sustained. See section 113(b).

* * * * * * * *

Treasury Regulations 111, Sec. 29.23(e)-1, promulgated under the Internal Revenue Code of 1939, contain identical language.

Statement.

Taxpayer,[1] in February and March, 1938, was the owner of an undivided one-half interest in two parcels of improved real estate, located at 1740 Riverside Drive and 1723 Rancho, Los Angeles. [R. 88-89.] The adjusted cost basis, equal to the fair market value, of his interest in 1740 Riverside Drive was $29,907.50, and of his interest in 1723 Rancho was $13,272. [R. 89-91.] He also owned furniture and furnishings at the two addresses totalling $41,754.25 and personal effects of the value of $3,855. [R. 90-91.]

On March 2, 1938, the Los Angeles River suddenly overflowed its channel and caused a flood which entirely washed away and destroyed the houses, other improvements, furniture and other personal property on these two lots, so that the aggregate value of taxpayer's interest in the lands after the flood was $2,000. Taxpayer had no insurance or other right to reimbursement for damages except his rights, if any, against the Los Angeles County Flood Control District. [R. 92.]

On May 31, 1938, he filed a claim with the district in the amount of $220,740 for reimbursement for the foregoing and other damages. This claim was denied by the Los Angeles Flood Control District in December, 1938. Taxpayer then filed suit against the district in February, 1939, in the Superior Court in and for the County of Los Angeles. He obtained a jury verdict in the amount of $80,000, and judgment was entered for that amount

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[1]For purposes of this brief Earl Callan will be referred to as the taxpayer. The other taxpayer, Helen Callan, his present wife, owned no interest in the property damaged in 1938. [R. 88.]

on March 27, 1946. The flood control district filed a motion for a new trial, which was granted by the Superior Court, and the court's order for a new trial was affirmed on appeal. The new trial was never held, and in 1948 taxpayer entered into a settlement with the flood control district. His net recovery, after payment of attorneys' fees and costs and of $4,201.53 to his former wife, was $4,201.53. [R. 92-94.]

Taxpayer did not deduct any part of the loss from the flood on his income tax return for the year 1938. For that year because of other deductions, taxpayer had a net loss of approximately $1,700, and therefore, no tax payable. [R. 96.]

In the present suit it is stipulated that the loss, except for that held to be properly sustained and deductible in 1938, shall be deemed to be loss sustained by the taxpayer in the year 1948. [R. 85, 97.]

In this action taxpayer's complaint [R. 3-37], filed March 10, 1952, set out the facts of the flood and of the litigation against the flood control district, and, with reference to the year 1938 stated that [R. 7]:

> From and after the time of said flood and continuously thereafter during the year 1938, plaintiff strongly believed and was advised by his attorneys that he could obtain reimbursement for his loss by legal action against the Los Angeles County Flood Control District.

After the court granted the Collector's motion to dismiss [R. 38-44] in the similar case of *Earl Callan v. Westover,* Civil No. 13,357-WM, relating to the taxable years 1944, 1945, and 1946 [R. 45-46], taxpayer amended his com-

plaint by inserting after the words quoted above the following language [R. 53]:

> * * * and in fact had a reasonable chance at the end of the year 1938 to obtain said reimbursement and possibly a profit.

The court on October 30, 1953, denied the Collector's motion to dismiss the amended complaint, in its memorandum of decision in the companion case [R. 55-73] stating in relevant part that [R. 72]:

> In my opinion the allegations *inter alia* in the amended complaint that plaintiff "strongly believed and was advised by his attorneys that he could obtain reimbursement for the damages to his property by legal action against the Los Angeles County Flood Control District and in fact had a reasonable chance at the end of the year 1938 to obtain said reimbursement" sufficiently tender an issue of ultimate fact for trial by jury as plaintiff has demanded. * * *
>
> The issue thus tendered is whether, in the light of all of the surrounding circumstances, plaintiff exercised ordinary business care and prudence in delaying deduction of loss until the taxable year 1946.

At the trial taxpayer introduced testimony and other evidence that engineers and attorneys advised him that the flood control district was negligent and that he would recover, and that he believed he would recover. [Not printed, but referred to at R. 185-187, 189, 191.]

In its instructions to the jury on this issue [R. 160-163] the court below stated that the issue was whether in the light of all the surrounding circumstances taxpayer exercised ordinary business care and prudence in delaying

deduction of his loss until 1948, stating in part that [R. 161-162]:

> In this connection the jury should consider, along with other surrounding circumstances shown by the evidence: (1) the date of the physical loss; (2) whether plaintiff Earl Callan made a full and fair disclosure of the facts to an attorney and thereafter reasonably and in good faith followed and relied upon the advice of his counsel; the jury may also consider the success or lack of success of plaintiff Earl Callan in the prosecution of his claim against the Flood Control District; (3) whether plaintiff Earl Callan prosecuted his claim against the Flood Control District in good faith that he had a reasonable chance of recovering on his claim against the Flood Control District.

The following question was submitted to the jury [R. 113, 168]:

> Question 1: "Was plaintiff Earl Callan's loss from the March 2, 1938 flood finally and entirely sustained and deductible by him in 1938 or 1948?"

The jury found the answer to be 1948, and judgment was entered for taxpayer accordingly. [R. 113-115.]

Statement of Points to Be Urged.

1. The District Court erred in denying appellants' motion to dismiss the amended complaint;

2. The District Court erred in denying appellants' motion for directed verdicts on question No. 1;

3. The District Court erred in instructing the jury [R. 160-161], to wit:

> The law permitted plaintiff Earl Callan nonetheless to delay claiming a tax deduction for the loss while

pursuing his claim against the Flood Control District, if to do so would be the exercise of ordinary business care and prudence under all the surrounding circumstances.

4. The District Court erred in instructing the jury [R. 163], to wit:

> If the jury should find from the evidence, as plaintiffs contend, that plaintiff Earl Callan did exercise ordinary business care and prudence in delaying deduction of the loss in question for income tax purposes until his claim against the Los Angeles County Flood Control District was finally settled in 1948, then the jury should find that the loss for income tax purposes was not finally and entirely sustained, and so did not become properly deductible, until the year of settlement—the year 1948.

5. The District Court erred in instructing the jury [R. 165], to wit:

> * * * you have two years here, 1938 and 1948, and if you find that the plaintiff exercised reasonable care, business care and prudence in postponing the loss until 1948, he is entitled to deduct it whether this is a residential property or a business property.

6. The District Court erred in submitting to the jury the question [R. 168], to wit:

> Question 1: Was plaintiff Earl Callan's loss from the March 2, 1938 flood finally and entirely sustained and deductible by him in 1938 or 1948?

7. The District Court erred in instructing the jury [R. 168-169], to wit:

> So, you are called upon to find, under the instructions, whether plaintiff Earl Callan acted with reason-

able business care and prudence in postponing claiming the deduction from 1938 when the physical loss occurred until 1948 until after he settled his claim finally with the Flood Control District.

8. The District Court erred in leaving the issue as to the year in which the loss is deductible to the jury as a question of fact, and in instructing the jury that they should consider, along with other surrounding circumstances: the date of the physical loss; and whether the taxpayer made a full and fair disclosure of the facts to an attorney and thereafter reasonably and in good faith followed and relied upon his advice; and the success or lack of success of the prosecution of his tort claim; and whether the taxpayer prosecuted his tort claim in good faith that he had a reasonable chance of recovery.

9. The District Court erred in not instructing the jury that where, as in this case, a physical loss has occurred which is not compensated for by insurance, the fact that the taxpayer asserts a disputed tort claim does not postpone the year in which the loss is to be taken; that a disputed tort claim is too contingent to warrant such postponement.

10. The District Court erred in not directing a verdict for the appellants on the issue as to the year in which the loss is deductible.

11. The District Court erred in not directing the jury to find that the loss is deductible only for 1938.

12. The District Court erred in not granting appellants' motion for judgment notwithstanding the verdict and for partial new trial.

13. The District Court erred in entering judgment for the appellees.

14. The District Court erred in denying appellants' motion for judgment of dismissal under Rule 41(b) at the close of appellants' case. [R. 173, 177-178.]

15. The District Court erred in failing to give appellants' proposed instruction No. 4. [R. 102-103.]

16. The District Court erred in failing to give appellants' proposed instruction No. 5. [R. 103.]

Summary of Argument.

Under the Internal Revenue Code an individual may deduct losses sustained during the taxable year and not compensated for by insurance or otherwise. As a corollary, he may not deduct a loss in a year other than that in which it was sustained.

The loss here in question was caused by a flood which in March, 1938, completely destroyed taxpayer's property. It was not compensated for by insurance. Taxpayer had a claim for damages against the Los Angeles County Flood Control District on which he in 1938 reasonably and in good faith believed he would recover. The district denied his claim in that year and contested any liability. On these facts, if the loss was sustained in 1938, taxpayer's tort claim was too contingent and speculative to be compensation for the loss. Both the fact of any recovery and its amount were unpredictable.

Nor does the fact that taxpayer had such a claim mean that the loss was not sustained in 1938. The physical destruction was complete in 1938; the extent of the damage to the property was known—it had totally lost its

value. This is not a case like embezzlement, where the loss may be unknown to the taxpayer. Nor is it a case of a business loss, where the diminution of value in stock, the collectibility of a debt, or the chance of pulling through a doubtful contract, depend on business events and the impact of numerous economic factors. In those cases identification of the moment when the intangible property has ceased to have value and accordingly when a loss has been sustained calls for the exercise of sound business judgment, guided by neither undue optimism nor undue pessimism. There can be a limited discretion as to fixing upon the identifiable event that marks the moment of loss.

In the present case there is no room for such discretion. The flood occurred, the property was destroyed, and the loss was sustained. There was no occasion to exercise judgment.

Even if the same guides are to be applied in determining the time of a physical loss as of a business loss, once the event causing the loss has been identified, the fact that a claim for damages exists, or even that later recovery is had on that claim, does not result in the loss not having been sustained. The problem, on the occasion of business losses, has been to identify the events which mark the loss. Once they have been determined, the claim for damages has been regarded as irrelevant. Here there has been no problem in identifying the event; the claim for damages is entitled to no greater attention than in the case of business losses.

ARGUMENT.

Taxpayer Sustained a Loss, Not Compensated for by Insurance or Otherwise, When His Property Was Destroyed by Flood in 1938, and Not in 1948, When His Claim for Damages Was Settled.

The facts in this case are not here in dispute. They were stipulated or must be deemed found by the jury under the instructions given. They are in essence that taxpayer's property was destroyed by flood in 1938, and the Flood Control District in 1938 denied any liability to compensate him, but taxpayer reasonably and in good faith relied on the advice of counsel and believed in good faith at the close of 1938 that he had a reasonable chance of recovering on his claim against the Flood Control District.

We submit that under such facts the law does not authorize deferring the deduction from the year of destruction of the property until a later year. Under Section 23(e) of the Revenue Act of 1938 *(supra),* applicable to the year 1938, identical in this respect with Section 23(e) of the Internal Revenue Code of 1939 *(supra),* applicable to the year 1948, an individual may deduct "losses sustained during the taxable year and not compensated for" by insurance or otherwise. It is perfectly plain that a loss here was sustained in 1938, when the property was destroyed by flood. This is not a case where there may be doubt as to whether property, tangible or intangible, has lost its market value in a particular year, where there may be ground for differences of opinion based on reasonable business judgment. On the contrary the property involved—houses, swimming pool, other improvements, furniture, clothes—had been wiped out of existence, finally and completely.

It is hardly necessary to refer to the Regulations *(supra),* cited with approval in *Boehm v. Commissioner,* 326 U. S. 287, 292, which clarify the meaning of the words "losses sustained" by stating that in general they must be evidenced by "closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed." The Regulations are helpful in determining the time of loss in business transactions; they merely confirm the obvious in a case such as this.

If the loss was sustained during the year 1938, the only question under the statute is whether the loss may be said to be "compensated for" because taxpayer reasonably believed that he could recover damages in a tort action against the Flood Control District. Or, under the Regulations, was his claim and cause of action "compensation received" to be considered in determining the amount of the loss? We believe that a cause of action for negligence, with the defendant vigorously contesting liability, no matter how reasonable or *bona fide* the opinion of the taxpayer as to his eventual success, cannot be said to be compensation for the complete physical destruction of taxpayer's property.

The issue under Section 23(e) is whether a loss was in fact sustained. A taxpayer cannot choose the year in which he wants to take a deduction. *United States v. Ludey,* 274 U. S. 295. The determination is to be made as of the year 1938. *Burnet v. Sanford & Brooks Co.,* 282 U. S. 359. Under these established rules the issue here is pointed up if we assume that taxpayer had claimed his loss in 1938, and the Commissioner had disallowed the deduction, holding that there was no loss so long as a claim for damages existed which the attorneys here in-

volved declared had a reasonable chance of success. We believe it clear that the courts would uphold the taxpayer. *Cahn v. Commissioner,* 92 F. 2d 674 (C. A. 9th). But the rule works both ways. A taxpayer may deduct his loss in the year it is sustained; he cannot deduct it in any other year. The same standards are to be applied regardless of whether in a particular case they work to the advantage of the taxpayer or operate in favor of the Government.

The inappropriateness of holding this tort claim to be "compensation" to taxpayer here, who reported on the cash basis, is illustrated by the fact that it would not be considered income even to an accrual basis taxpayer. See *H. Liebes & Co. v. Commissioner,* 90 F. 2d 932, 937 (C. A. 9th). Even a claim for just compensation based on the Constitution and federal statutes would not be income. *Commissioner v. Henry Hess Co.,* 210 F. 2d 553 (C. A. 9th). Nor would a claim based on war contract termination by the Government bar the deduction of a loss. *Sharp v. Commissioner,* 224 F. 2d 920 (C. A. 6th).

A claim for damages is not deductible by the defendant where the amount of damages, if any, is wholly unpredictable and liability is denied. *Lucas v. American Code Co.,* 280 U. S. 445, 451. Conversely, it cannot be income or compensation to the plaintiff. See *Commissioner v. John Thatcher & Co.,* 76 F. 2d 900 (C. A. 2d); *Hinrichs v. Helvering,* 95 F. 2d 117 (C.A. D.C.).

As we read the opinion of the court below it did not hold that there was a loss sustained in 1938 which was compensated for (or could be so found by a jury) by the claim for damages. The court did not so hold, and in

the light of the foregoing discussion we do not believe it could have considered such claim as compensation. If it had so held, it would have been in error.[2] Rather, we construe the opinion and the court's instructions as holding that no loss was sustained at all (regardless of whether or not it was compensated for) if the taxpayer, reasonably relying on his claim and in the exercise of ordinary business care, chose not to treat the loss as a closed and completed transaction, fixed by an identifiable event. [R. 66, 68, 160-163.] This holding is equally erroneous.

Whatever the scope to be given to a taxpayer's business judgment in continuing business transactions, in weighing many factors to determine when a loss is sustained, see *Lewellyn v. Elec. Reduction Co.,* 275 U. S. 243, 246-247; *First Nat. Corp. v. Commissioner,* 147 F. 2d 462 (C. A. 9th); *Douglas County Light & Water Co. v. Commissioner,* 43 F. 2d 904, 905 (C. A. 9th); *Clark v. Welch,* 140 F. 2d 271 (C. A. 1st); *Belser v. Commissioner,* 174 F. 2d 386 (C. A. 4th), the reasons for giving even a limited discretion to the taxpayer have no applicability to a case where an obvious physical loss has been sus-

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[2]If, however, this Court should disagree, and should decide that this was a proper question to be submitted to the jury, we believe the court below erred in failing to give proposed Instruction No. 4 [R. 102-103] as follows:

> You are to determine whether plaintiff Earl Callan's claim for reimbursement against the Los Angeles County Flood Control District for damages due to claimed negligence by the District and which had been denied by the District at the close of 1938 was "compensation by insurance or otherwise" and thus served to postpone the loss until the amount thereof, if any, was finally determined, as plaintiffs contend, or whether said claims for damages were too contingent and uncertain to be treated as compensation by insurance or otherwise for the loss, as defendants contend.

tained. Even in a case where there was no physical loss, the claim would not justify deferring the loss. In *Boehm v. Commissioner,* 326 U. S. 287, taxpayer had a claim for damages to the value of her stock which resulted in 1937 in a settlement in which she received more than a third of the purchase price of the stock. The Court held that the existence of the lawsuit did not defer the loss until 1937, the worthlessness of the stock having been established by "identifiable events" occurring long prior to 1937.

In *United States v. White Dental Co.,* 274 U. S. 398, 401, holding that a loss occurred when taxpayer's subsidiary was seized by the German Government in 1918, even though it had later been awarded damages by the Mixed Claims Commission, the Court pointed out that the statute and Regulations—

> contemplate the deduction from gross income of losses, which are fixed by identifiable events, such as the sale of property (Art. 141, 144), or caused by its destruction or physical injury (Art. 141, 142, 143) or, in the case of debts, by the occurrence of such events as prevent their collection (Art. 151).

This language contemplates a different test for losses caused by physical destruction from that for losses which have to be shown by events. Similarly, in *Lewellyn v. Elec. Reduction Co.,* 275 U. S. 243, 247, the Court mentioned as obviously dissimilar from a loss incurred in business transactions one caused by the burning of a house. There may be occasion for the exercise of "business care and prudence" [R. 161] to determine when stock has become worthless, or when a debt is uncollectible, or when a contract should be abandoned. There is no occa-

sion to exercise judgment to determine when a flood has destroyed a house.

We believe that the court below was led into error by certain language [R. 62, 64-66] from *Boehm v. Commissioner, supra,* and *Alison v. United States,* 344 U. S. 167, taken out of the context of those cases, and interpreted by the court as modifying previously established principles.

In the *Boehm* case, the question was as to the year in which shares of stock became worthless. The Court (p. 292) rejected taxpayer's "subjective test" as to when the stock became worthless, "said to depend upon the taxpayer's reasonable and honest belief as to worthlessness, supported by the taxpayer's overt acts and conduct in connection therewith." The Court said this test could not be used "as the controlling or sole criterion," that the loss, to be deductible, "must have been sustained *in fact* during the taxable year." The Court went on to say that all pertinent facts and circumstances are to be considered, "regardless of their objective or subjective nature," and (p. 293) that the taxpayer's "attitude and conduct are not to be ignored," but are not to be the decisive factor in every case.

The Court there was referring to the test for determining when stock became worthless, a question necessarily calling for the exercise of judgment on the part of the taxpayer, as well as later by the courts. There is no occasion for the exercise of any judgment, subjective or objective, as to the date on which the Los Angeles River destroyed taxpayer's property. The issue which concerned the Court in the *Boehm* case does not even arise in the present one.

Even if the language in the *Boehm* case is considered applicable here, it should be noted that the Court, having found "identifiable events" to show the worthlessness of the stock prior to 1937, did not regard the claim for damages against a third party for destruction of the value of the stock as rendering them any less identifiable. *A fortiori,* a claim for damages cannot render uncertain the time of loss arising from such a fixed event as a flood which completely destroyed the property.

Furthermore, even if inquiry into taxpayer's good faith opinion as to the value or merit of his claim in 1938 is permissible, we submit that the instructions of the court below when read in context [R. 160-163] violate the warning of the *Boehm* case by making that inquiry controlling and decisive.

Alison v. United States, 344 U. S. 167, held that embezzlement losses can be held to have occurred in the year in which the embezzlement is discovered. The Court emphasized (p. 169) "the special nature of the crime of embezzlement," whose essence is secrecy. It is different from the usual case where taxpayers are "well aware of all the circumstances of financial losses." The Court carefully limited its holding to that special case, and there is no suggestion that it intended to lay down a rule departing from its earlier decisions as to the year in which losses are sustained.

It may be noted that in the *Boehm* case not only was the fact that a claim for damages existed not considered

sufficient to prevent the loss from being sustained, but also the fact that it resulted in a later recovery was considered irrelevant. This application to losses of the broader principle of annual accounting periods has been the general rule. See *Cahn v. Commissioner,* 92 F. 2d 674 (C. A. 9th); *Rhodes v. Commissioner,* 100 F. 2d 966 (C. A. 6th); *Sharp v. Commissioner, supra; Niagara Share Corp. v. Commissioner,* 82 F. 2d 208 (C. A. 4th); *United States v. White Dental Co., supra.* In the present case, however, the court instructed the jury [R. 161-162] that it could consider "the success or lack of success" of taxpayer in the prosecution of his claim. This was erroneous.

The narrow issue here involved, whether deduction of a physical loss may be deferred until a future year because of the existence of a claim for damages, was presented in *Commissioner v. Highway Trailer Co.,* 72 F. 2d 913 (C. A. 7th), certiorari denied, 293 U. S. 626. There the taxpayer suffered a fire loss in 1921, but claimed that the loss was due to the negligence of another party. The court held that the loss occurred in the year of the fire and not in the later year when it became established that taxpayer would not recover for that part of the loss not compensated for by insurance. *Cf. Commissioner v. Harwick,* 184 F. 2d 835 (C. A. 5th); but see *Cahn v. Commissioner, supra.*

We submit that on the facts set out in the complaint or as brought out at the trial, the loss in question was as a matter of law sustained in 1938 and not then compen-

sated for by insurance or otherwise. Accordingly, the court below erred in denying the motion to dismiss the amended complaint, in denying the motion for directed verdicts on this question, in not directing a verdict for the appellants, in not directing the jury to find that the loss is deductible only for 1938, and in denying the motion for judgment notwithstanding the verdict and for partial new trial.

If this Court should disagree and should hold that there is a question for the jury as to whether the loss was sustained in 1938 and was not compensated for by insurance or otherwise, we urge that the case should be remanded for a new trial, under proper instructions. The instructions given were erroneous in giving controlling weight to taxpayer's state of mind, and in making relevant to the question of loss in 1938 the fact of partial recovery ten years later. Furthermore, if they can be taken to mean that a disputed tort claim is compensation, they are in conflict with settled rules as to what is compensation under the income tax law.

Furthermore the court below erred in refusing to give requested Instruction No. 5 [R. 103] as follows:

> The loss of plaintiff Earl Callan was deductible in the year it was evidenced by a closed and completed transaction fixed by an identifiable event and bona fide and actually sustained during the taxable period.

This instruction, in the language of the Treasury Regulations, *supra,* which has received congressional and judicial approval (*Boehm v. Commissioner, supra*), was essential if the jury was to be properly advised as to the applicable law, and was not to give decisive weight to taxpayer's subjective opinion.

Conclusion.

The judgment of the court below should be reversed. If this Court believes that there is a question for the jury whether the loss was sustained in 1938 and not compensated for by insurance or otherwise, the case should be remanded for a new trial.

Respectfully submitted,

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